

HOPI TRIBE,
v.
DIRECTOR, OFFICE OF TRUST RESPONSIBILITIES,
BUREAU OF INDIAN AFFAIRS 1/

IBIA 92-207-A

Decided June 22, 1993

Appeal from the denial of attorney fees requested under the Navajo-Hopi Settlement Act of 1974.

Reversed and remanded.

1. Indians: Generally--Indians: Attorneys: Fees--Statutory Construction: Administrative Construction

Courts commonly give deference to the construction of a statute by the agency charged with its administration, particularly one which was contemporaneous with the statute and has been consistently followed by the agency.

2. Indians: Attorneys: Fees

25 U.S.C. §§ 640d-7(e) and 640d-27(a) (1988) both mandate the payment of "appropriate" or "reasonable" litigation costs incurred by the Navajo Nation, the Hopi Tribe, and the San Juan Southern Paiute Tribe under the Navajo-Hopi Settlement Act, 25 U.S.C. §§ 640d--640d-28 (1988).

APPEARANCES: A. Scott Canty, Esq., and Gary E. LaRance, Esq., Kykotsmovi, Arizona, for appellant; Neil McDonald, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Director.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellant Hopi Tribe seeks review of a June 1, 1992, decision (1992 decision) of the Director, Office of Trust Responsibilities, Bureau of Indian Affairs (Director; BIA), denying appellant's request for attorney fees pursuant to 25 U.S.C. § 640d-7(e) (1988). 2/ For the reasons discussed below, the Board of Indian Appeals (Board) reverses that decision

1/ The appellee's title has been changed from Director, Office of Trust and Economic Development, to Director, Office of Trust Responsibilities.

2/ All further references to the United States Code are to the 1988 edition.

and remands this matter to the Director for a determination of the amount of attorney fees which would have been allocated to appellant under section 640d-7(e) but for the Director's decisions.

Background

In an earlier decision in this matter, the Board vacated the Director's September 18, 1990, decision (1990 decision) denying appellant's request for attorney fees, and remanded the matter for further consideration. Hopi Indian Tribe v. Director, Office of Trust & Economic Development, 22 IBIA 10 (1992) (Hopi I). The full history of this controversy is set forth in Hopi I and will be repeated here only to the extent necessary for an understanding of this decision. See 22 IBIA 11-15.

There have been long-standing disputes among appellant, the Navajo Nation, and the newly recognized San Juan Southern Paiute Tribe over land use rights on reservations created by an 1868 treaty (15 Stat. 667), an 1882 executive order, and a 1934 statute (48 Stat. 960). After lengthy debates, Congress determined in the Navajo-Hopi Settlement Act, 25 U.S.C. §§ 640d-640d-28 (Settlement Act), that these disputes could best be resolved through litigation. Because the Department of Justice could not represent any of the tribes without being in a conflict-of-interest situation, Congress provided for payment of private attorney fees and related legal expenses by the Secretary of the Interior (Secretary).

At issue in this appeal are the two statutory sections providing for payment of attorney fees. 25 U.S.C. § 640d-7(e), relating to the boundaries established in the 1934 statute, provides: "The Secretary * * * is authorized to pay any or all appropriate legal fees, court costs, and other related expenses arising out of, or in connection with, the commencing of, or defending against, any action brought by the Navajo, San Juan Southern Paiute, or Hopi Tribe under [the Act]." 25 U.S.C. § 640d-27(a), relating to the boundaries of the 1882 executive order reservation, provides:

In any litigation or court action between or among the Hopi Tribe, the Navajo Tribe and the United States * * * arising out of the interpretation or implementation of this subchapter, as amended, the Secretary shall pay, subject to the availability of appropriations, attorney's fees, costs and expenses as determined by the Secretary to be reasonable. For each tribe, there is hereby authorized to be appropriated not to exceed * * * \$160,000 in fiscal year 1985, and each succeeding year thereafter until such litigation or court action is finally completed.

By letter dated November 7, 1989, appellant's chairman wrote to the Assistant Secretary - Indian Affairs (Assistant Secretary) asking that at least \$380,000 be allocated to it under section 640d-7(e), and that \$160,000 be allocated under section 640d-27(a). The Director responded on December 9, 1989, stating:

This is in response to your November 7, 1989, letter regarding funds for attorney fees. The funds appropriated

under P.L. 101-121 ([103 Stat. 701,] 1990 Interior Appropriations Act), will be distributed among the three tribes involved in the Navajo-Hopi dispute in accordance with the language of the Appropriations Act for each tribe.

With the exception of specific Congressional directives, tribal requests for attorney fees are determined on the basis of applications that are processed in accordance with procedures found in 25 CFR Part 89.40 through 43. [3/] Therefore, requests for attorney fees by the Hopi Tribe, unless Congressionally mandated, should be applied for along with other tribes.

The Chairman replied to this letter on January 16, 1990, stating that payment of attorney fees for this litigation was mandated by Congress, and the Department's 1990 appropriations statute and its legislative history further instructed the Department to provide this funding. The Chairman asserted that the Department had previously treated appellant's requests for funding under the Settlement Act as exempt from 25 CFR 89.40-.43.

There is no response to the Chairman's letter in the administrative record. The Chairman again wrote the Director on June 25, 1990, explaining in more detail the way the Department had previously treated requests under these statutes. He stated that he had learned that no funds had been allocated for appellant's attorney fees for FY 1990 and that the attorney fee fund had already been fully allocated to other tribes. Inquiries on appellant's behalf by the Hopi Agency Superintendent and the Phoenix Area Director confirmed that the Director was requiring appellant to apply for funds under 25 CFR 89.40-.43, and that all FY 1990 attorney fee funds had been allocated to other tribes.

After receiving another letter from the Chairman, the Director wrote on September 18, 1990:

By my letter * * * dated December 9, 1989, the tribe was invited to submit an application for attorney fees for consideration under

3/ The cited regulations provide procedures to be followed when an Indian tribe requests discretionary funding from BIA to secure legal representation. Section 89.43(a) provides:

"A tribe * * * seeking funds under § 89.41 shall submit a written request through the Agency Superintendent and the Area Director, including

"(1) A detailed statement describing the nature and scope of the problem for which legal services are sought;

"(2) A statement of the terms, including total anticipated costs, of the requested legal services contract;

"(3) A current financial statement and a statement that the tribe does not possess sufficient tribal funds or assets to pay all or a part of the legal services sought; and

"(4) A statement of why the matter must be handled by a private attorney as opposed to the Department of Justice or Department of [the] Interior attorneys."

the procedures found at 25 CFR 89.40. This was to ensure that proper consideration could be given to the payment of expenses which might be incurred in connection with 25 U.S.C. § 640d-7(e). At about the same time as the December 9 letter, the Chairman in a meeting with the Assistant Secretary * * * was advised, verbally, of the necessity for submission of an application by the Tribe so the Attorney Fee Review Committee could review that application. No application has been received to date.

Regrettably, there are no funds left in the attorney fees account for Fiscal Year 1990. You, and the Tribe, are urged to submit an application at your earliest opportunity for consideration in the Fiscal Year 1991 review cycle.

Appellant appealed this decision to the Board. In Hopi I, the Board found that the Department had previously interpreted both sections 640d-7(e) and 640d-27(a) as congressional mandates to pay attorney fees and had not required the filing of applications under 25 CFR 89.40-.43 for attorney fees sought under either section; that during FY 1989, the Director suggested that both sections were discretionary and applications for funding should be filed under 25 CFR 89.40-.43, but ultimately did not require such a filing under either section; that during FY 1990, a distinction was drawn between the two sections, under which section 640d-27(a) continued to be interpreted as a mandate, but section 640d-7(e) was interpreted to be discretionary and to require the filing of an application under 25 CFR 89.40-.43; that this new interpretation was not clearly or timely communicated to appellant (or the BIA Agency and Area Offices); and that this new interpretation was apparently not applied uniformly to appellant and the San Juan Southern Paiute Tribe. The Board concluded:

The Director has stated his conclusion that section 640d-7(e) is discretionary. He has not, however, explained how he reached that conclusion, or why the prior administrative practice was incorrect. Neither has he uniformly applied the new interpretation to all persons similarly situated. Under these circumstances, the Board cannot hold that the Director has adequately explained his departure from the prior administrative practice. See Bonaparte [v. Commissioner of Indian Affairs, 9 IBIA 115 (1981)]. His decision must, therefore, be vacated, and this matter remanded to him for further consideration. [Footnote omitted.]

(22 IBIA at 19).

The Director issued a second decision on June 1, 1992. The substantive portions of this decision state:

Congress passed the Hopi and Navajo attorney fee provision of 25 U.S.C. § 640d-7(e) in 1974. As the result of the Comptroller General's opinion B-114868, of December 6, 1976, the attorney fee regulations were promulgated in 1983. The existing administrative practice was not adjusted in 1983 to require that the Hopi and

Navajo Tribes use the vehicle of the regulations to apply for attorney fees under section 640d-7(e)

In 1989, my first year in this position, the Hopi Tribe requested \$360,000 for section 640d-7(e) attorney fees for FY 1990, a substantial increase over the \$190,000 which it received in FY 1989. * * * This major increase in the amount requested caused me as Director to review the prior administrative practice because the appropriation for attorney fees is a single line item from which all attorneys fees had to be taken. This review led me to the conclusion that the prior administrative practice of not requiring an application and processing under the attorney fee regulations was an incorrect and mistaken practice which should be corrected.

Without a standard application procedure, I concluded, there could be no systematic basis for me to recommend the exercise of the Assistant Secretary's discretion as to the appropriate amount of attorney fees under section 640d-7(e). This became apparent to me because I serve ex officio under the regulations on the attorney fee review committee established by 25 C.F.R. § 89.43. That committee considers the other attorney fee applications for funding from the same appropriation which funds the Navajos, Hopis, and San Juan Southern Paiutes.

It occurred to me that uniformity in the application process would avoid arbitrariness and provide a more standard, systematic method of arriving at recommendations for the Assistant Secretary, especially when the process requires that appropriated funds for all attorneys fees be allocated by the Executive Branch. I therefore decided to correct the prior administrative interpretation of the statute with respect to section 640d-7(e) funds and to require an application for attorney fees under 25 C.F.R. §§ 89.40-.43, which would provide a method for the rational consideration of the proper amount for the Hopi Tribe. It seemed to me then, and it still does now, that the plain language of the statute is discretionary as to the amount to be paid for the section 640d-7(e) litigation. Because the money comes out of the same appropriation for attorney fees that other tribes are applying for, it makes sense to me to consider them all in a similar process.

To have awarded the Hopi Tribe \$360,000 out of the attorneys fees appropriation, without careful documentation and consideration of the Tribe's need for that amount of funds, would have been arbitrary or capricious to the other tribes which had applied for those same funds. The Hopi Tribe chose not to comply even after its leadership, the agency superintendent, and the area director were made aware of my decision to process the Tribe's request together with and under the same method as the other requests for attorney fees.

By this letter, I hope to make clear that in order to determine the amount the Hopi Tribe is to receive under section 640d-7(e), the Tribe must now make application under 25 C.F.R. §§ 89.40-.43. Although the Tribe has an easier initial burden because its case is legislatively ordained, the statute clearly fails to specify the amount of attorney fees for each year of litigation. Some rational method must be used, and the attorney fee review committee procedure is the method now used. Please advise the Tribe to make application as requested.

The San Juan Southern Paiutes are not "similarly situated." They are a new tribe and at that time were sui generis. For example, \$250,000 was paid, not to the Tribe, but to their attorneys for legal work already performed in the past while pursuing Federal recognition of the Tribe, as required by 25 U.S.C. § 640d-7(f)(3). The Hopis and the Navajos received \$160,000 each in attorney fees for FY 1990 for the 1882 reservation litigation under 25 U.S.C. § 640d-27(a). In an attempt to treat the Tribes equally, I recommended \$160,000 in attorney fees for the San Juan Southern Paiutes for FY 1990. This was done without a legal analysis of the Tribes' standing under the different provisions of the law, but it appeared to me to treat the three Tribes fairly and equally.

It is my position that I acted fairly and reasonably in trying to treat the three Tribes equally, so that each received \$160,000 in attorney fees for FY 1990. Perhaps my approach was not able to be reconciled with every possible divergent legal distinction, but it was a well-reasoned decision and it appeared to be equitable under the circumstances existing at the time. It certainly was not arbitrary and capricious. [Footnotes omitted.]

(Decision Letter at 1-3).

On June 15, 1992, the Board received a motion from the Director asking that Hopi I be reopened for the issuance of a final decision. In support of this motion, the Director stated that on August 27, 1991, the United States District Court for the District of Arizona entered an order in Hopi Indian Tribe v. United States, CIV-90-1462-PCT-RCB, staying proceedings before the Court pending a final decision by the Board in Hopi I. The Director asked that the Board reopen Hopi I and enter a final order affirming his 1992 decision.

Because the Director's 1992 decision did not inform appellant of its appeal rights, the Board took the Director's motion under advisement and gave appellant 30 days in which to file an appeal if it so desired. The order further stated that "[i]f [appellant] fails to file a timely notice of appeal, in order to avoid any possible misunderstanding of the Court's order, [Hopi I] will be reopened for the purpose of summarily affirming the Director's decision" (Order at 2).

The Board received a notice of appeal from appellant on July 20, 1992. Following receipt of the complete administrative record, including the record that had been before the Board in Hopi I, the Board issued a notice of docketing for the present appeal and an order denying the Director's motion to reopen Hopi I. The new appeal has been briefed by both parties.

Discussion and Conclusions

On appeal, appellant contends that

[d]espite [the Board's] directive that the Director explain "why the prior administrative practice was incorrect," the Director, on remand, offers no such explanation. The record is still devoid of any explanation of why the administrative practice followed from 1975 to 1989 is incorrect. On the contrary, [appellant's] position both in the initial appeal and this appeal continues to be that the prior administrative practice of processing attorney fee requests under 640d-7(e) without resort to 25 C.F.R. Part 89.40 is the correct interpretation of the statute. The Director's remand decision moves us no closer to resolving the legal question of whether attorney fees under 640d-7(e) is mandatory or discretionary.

(Opening Brief at 3). Accordingly, appellant reiterates all of the arguments it made in the earlier appeal, in addition to raising several new ones.

In its earlier decision, the Board stated:

It is settled law that an administrative agency can change its interpretation of law in order to correct prior error. * * * The Director therefore had the authority and the responsibility to correct any prior erroneous administrative interpretation of the statute. However, because persons dealing with a Federal agency are entitled to rely on prior administrative interpretations, any change in the agency's position must be fully and clearly explained in order to show that the change is not arbitrary or capricious.

* * * * *

The Board agrees with appellant that the legislative history of the [Settlement Act] shows that Congress determined the dispute should be resolved through the courts, and that, because the problem had been created by the United States, the United States should be responsible for the appropriate costs of the litigation. This decision was reached after extensive discussion and debate, which included examination of other alternatives for resolution of the dispute. Although the statement

in the 1988 committee report [4/] supports the interpretation of section 640d-7(e) which the Director now advocates, its persuasive effect is lessened by the lack of evidence that it received the same kind of thorough consideration by Congress as did the original decision to make the United States responsible for the appropriate costs of this litigation.

Of course, the Director could have determined that the prior administrative interpretation of section 640d-7(e) was incorrect without resort to the 1988 committee report. Such a determination might have been based on the language of the section. There is no question that, as the Director contends, the language of sections 640d-7(e) and 640d-27(a) is different. Rather, the question is whether that difference has any significance.

There is no indication that BIA believed there was any significant difference between the sections from 1980, when section 640d-27(a) was enacted, through FY 1988. According to appellant's undisputed statements, requests for funding under both sections were treated alike during this time period. Furthermore, again according to appellant's undisputed statements, BIA did not distinguish between the sections when, sometime during FY 1989, it began efforts to require the filing of an application under 25 CFR 89.40-.43 for funds appellant sought under both sections.

It was not until FY 1990 that BIA drew a distinction between the sections and required appellant to file an application for funds sought under section 640d-7(e), but not for funds sought under section 640d-27(a). [Citations and footnotes omitted.]

(Hopi I at 16-18).

The Director states in his 1992 decision that the initial impetus for his reversal of the Department's prior interpretation was the fact that appellant requested a "major increase" over the funding received in the previous fiscal year. The Director indicates that he determined that requiring

4/ In Hopi I, the Director contended that he based his decision in part on a statement in the House Report on the Navajo and Hopi Indian Relocation Amendments of 1988, H.R. Rep. No. 1032, 100th Cong., 2d Sess. 9 (1988):

"The [House Interior] Committee notes that a substantial amount of funds have already been paid by the Secretary * * * to the Navajo and Hopi Tribes pursuant to [section 640d-7(e)]. The Committee wants to emphasize that this subsection is not an entitlement and therefore, the Secretary is not obligated to pay any and all legal expenses incurred by the tribes under this section. It remains true, however, that the Secretary can, in his discretion, and contingent on the availability of funds for this purpose, pay for all appropriate legal fees, court costs, and other related expenses arising out of law suits brought under this section."

appellant to file a request for fees under 25 CFR 89.40-.43 would be a reasonable way for him to consider appellant's fee requests in relation to requests for discretionary attorney fees from other tribes.

The Director's 1992 decision fails to provide any reasoned support for the legal conclusion that section 640d-7(e) grants the Department complete discretion with respect to funding requests filed by appellant (or by the Navajo Nation or the San Juan Southern Paiute Tribe). Instead, it begins with that conclusion.

[1] The administrative record shows that from its enactment until FY 1990, section 640d-7(e) was interpreted by the Department as being a congressional mandate to pay appropriate legal costs and fees incurred by the Navajo Nation, the San Juan Southern Paiute Tribe, and appellant in litigation under the Settlement Act. An administrative interpretation of a statute contemporaneous with the enactment of that statute is entitled to great deference.

In Udall v. Tallman, 380 U.S. 1, 16 (1965), the Supreme Court stated:

When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. * * *
 “Particularly is this respect due when the administrative practice at stake ‘involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.’” [Citations omitted.]

The Court also places value on the consistency of an administrative interpretation. See, e.g., Watt v. Alaska, 451 U.S. 259, 272-73 (1981) (“The Department’s contemporaneous construction carries persuasive weight. * * * The Department’s current interpretation, being in conflict with its initial position, is entitled to considerably less deference”). (Citations omitted.) This does not mean, of course, that an agency is precluded from ever changing a longstanding interpretation of a statute. Cf. Montana v. Blackfeet Tribe, 471 U.S. 759, 768 n.7 (1985). It suggests, however, that such a change should be made with caution and only upon a conclusion that the Department’s initial interpretation was clearly erroneous.

Reindeer Herders Association v. Juneau Area Director, 23 IBIA 28, 61-62, 99 I.D. 219, 236-37 (1992). See also United States v. Bowan, 8 IBIA 218, 88 I.D. 261 (1981).

[2] The Board has reviewed the language of sections 640d-7(e) and 640d-27(a), the legislative history of the Settlement Act, the 1988 House

report, and the record and the parties' filings in both Hopi I and the present appeal. As originally passed by the House of Representatives and as reported to the Senate, the Settlement Act provided for legislative partitioning of the area disputed under the 1934 statute. Senator Metcalf, the bill's floor manager in the Senate, recommended that Congress partition the disputed area in order to avoid protracted litigation. See 120 Cong. Rec. 37546 (Nov. 26, 1974).

The present language of section 640d-7 was proposed by Senator Montoya as an amendment to the bill during the Senate floor debate. The Senator's amendment authorized litigation and judicial partitioning of the disputed area. The proposed amendment was strongly debated. See 120 Cong. Rec. 37724, 37731-42 (Dec. 2, 1974). Senator Goldwater, who favored the committee version of the bill, stated that "putting the * * * issue into the courts will delay a settlement * * * for two decades." Id. at 37733. Senator Jackson, who favored Senator Montoya's amendment and who had argued for that alternative in committee, contended that despite the fact that a judicial resolution of the dispute might be a lengthy process, a legislative partitioning would be arbitrary given the total disagreement on the relative rights and interests of appellant and the Navajo Nation. Id. at 37734. Senator Fannin responded that "the desire of the committee and the desire of all Senators is to cut down on the expense and long years of litigation. * * * No more burdensome case can be imagined than relitigating the same kind of case as the 1882 area. That has cost both tribes millions of dollars." Id. at 37734-35

Senator Montoya modified his original amendment to add subsection (e), authorizing the payment of attorney fees. Id. at 37740. During an exchange with Senator Montoya, Senator Metcalf stated: "I am not going to object to the modification. * * * I agree with the modification. I believe the attorney fees should be paid in the event that [Senator Montoya's] amendment is agreed to * * *." Id. at 37740.

Senator Montoya's amendment, including the modification, was narrowly agreed to by the Senate. Id. at 37748. The Senate adopted the bill with the amendment. Id. at 37749. The House agreed to the bill as amended by the Senate. 120 Cong. Rec. 38758-62 (Dec. 10, 1974). See also 120 Cong. Rec. 40264, 40265 (Dec. 16, 1974) (Extension of remarks by Representative Meeds: "Litigation expenses of the tribes are authorized to be borne by the United States").

When read out of historical context, section 640d-7(e) may appear to be a weaker mandate of payment than section 640d-27(a). This appearance is removed, however, when the importance of the subsection to the passage of the Settlement Act is considered. Especially given the history of section 640d-7(e), the Board finds that the difference in language between sections 640d-7(e) and 640d-27(a) does not support a conclusion that Congress intended to leave the payment of attorney fees and expenses under section 640-7(e) to the complete discretion of the Secretary.

The Board further finds that the discussion in the 1988 House report is not persuasive evidence of a congressional intent to make section 640d-7(e)

entirely discretionary. In Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102, 118 n.13 (1980), the Supreme Court stated:

A mere statement in a conference report * * * as to what the Committee believes an earlier statute meant is obviously less weighty. * * * [E]ven when it would otherwise be useful, subsequent legislative history will rarely override a reasonable interpretation of a statute that can be gleaned from its language and legislative history prior to its enactment.

The subsequent legislative history at issue here is entitled to even less weight given the fact that there is no indication that the matter was considered by the full Congress, as was the initial decision to make the United States responsible for appropriate legal costs.

Section 640d-7(e) provides for the payment of "appropriate" expenses; while section 640d-27(a) provides for the payment of those "expenses as [are] determined by the Secretary to be reasonable." Thus, both sections require the Secretary to determine whether all or merely some part of the requested expenses should be paid, and are, to that extent only, discretionary. ^{5/} However, under the Department's prior interpretation of the sections, which is here espoused by the Board, both sections require the payment of "appropriate" or "reasonable" fees and expenses. The Director's decision that section 640d-7(e) does not constitute a congressional mandate to pay appropriate attorney fees requested by appellant is reversed.

^{5/} There are suggestions that this fact may be partly responsible for the Director's decision. Noting that there is no upper limit on the amount available to the three tribes under section 640d-7(e), while there is in section 640d-27(a), the Director argues that this fact makes the entire section discretionary. The Director appears concerned that Congress did not make the determination of the amount to be available to the tribes, stating that "what the legislators did is widely recognized in Washington and elsewhere as typical of Congress: they passed the buck to the Executive Branch, namely, the Secretary of the Interior" (Answer Brief at 3).

It appears more likely that when Congress enacted section 640d-7(e) it knew that the litigation expenses would be high, but had no exact idea of the amount that would be involved. Rather than make an arbitrary determination as to the amount to be available to the tribes, Congress decided to allow the litigation to go forward, with the Secretary reviewing the actual expenses presented by the tribes under a standard of "appropriateness."

^{6/} There is some suggestion that the Director's decision may have been based at least in part on a belief that appellant has already received a substantial amount of money for this litigation, and other tribes are being harmed by the Department's continuing to fund the Settlement Act litigation because not enough money is appropriated for the attorney fees line item in the Department's budget. While the Board acknowledges that this litigation has been expensive, Congress knew that it would be, but still decided to proceed through litigation rather than through a legislative partitioning

Furthermore, the decision that appellant is required to request attorney fees pursuant to 25 CFR 89.40-.43 is also reversed on the grounds that fees requested under section 640d-7(e) do not fall within the ambit of those regulations. 25 CFR 89.41 provides that it applies when a tribe determines to undertake litigation to protect its rights. In this instance, the determination of the necessity of litigation was not made by one or more of the tribes involved, but was instead made by Congress. Requests for attorney fees under the Settlement Act are not subject to the regulations in 25 CFR 89.40-.43. Z/

fn. 6 (continued)

of the lands involved. Until Congress alters its intent, clearly and unambiguously, in subsequent legislation, the Department has the responsibility to fulfill the legislative mandate fully and to the best of its ability.

Z/ The Board will briefly address two other issues raised. Appellant cites the legislative history of the 1990 Interior Appropriations Act in support of its argument that Congress expected that part of the attorney-fees line item appropriation would be used to fund the Settlement Act litigation. In Lincoln v. Vigil, 61 U.S.L.W. 4490, 4492-93 (U.S. May 24, 1993), the Supreme Court stated:

"The allocation of funds from a lump-sum appropriation is another administrative decision traditionally regarded as committed to agency discretion. * * * For this reason, a fundamental principle of appropriations law is that where 'Congress merely appropriates lump-sum amounts without statutorily restricting what can be done with those funds, a clear inference arises that it does not intend to impose legally binding restrictions, and indicia in committee reports and other legislative history as to how the funds should or are expected to be spent do not establish any legal requirements on' the agency. LTV Aerospace Corp., 55 Comp. Gen. 307, 319 (1975); cf. * * * Tennessee Valley Authority v. Hill, 437 U.S. 153, 191 (1978) ('Expressions of committees dealing with requests for appropriations cannot be equated with statutes enacted by Congress')."

Because of its holding that section 640d-7(e) is a congressional mandate to pay appropriate legal costs, and is therefore, a "statute[] enacted by Congress" which "statutorily restrict[s]" how the Department can spend the appropriated funds, the Board does not need to consider the effect of the 1990 Interior Appropriations Act and its legislative history.

Secondly, in Hopi I the Board questioned whether appellant was treated differently than the San Juan Southern Paiute Tribe. From the record available to the Board, it appeared that the San Juan Southern Paiute Tribe had filed a request for attorney fees under section 640d-7(e) with the Assistant Secretary, as had appellant, and that the request was considered while appellant's was not.

The Director did not deny that the tribes were treated differently, but stated that the San Juan Southern Paiute Tribe was "a new tribe and at that time [was] sui generis." The Director, however, offers no explanation of why this fact should result in its application being considered when appellant's was not, even though both applications were filed the same way. The Board finds that the Director did not justify the inconsistent application of his new, albeit incorrect, interpretation of section 640d-7(e) as it related to appellant and the San Juan Southern Paiute Tribe.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the June 1, 1992, decision of the Director, Office of Trust Responsibilities, is reversed. This matter is remanded to the Director for a determination of the amount of attorney fees which would have been allocated to appellant under section 640d-7(e) but for the Director's 1990 and 1992 decisions. 8/

Kathryn A. Lynn
Chief Administrative Judge

I concur:

Anita Vogt
Administrative Judge

8/ Although appellant has requested several additional specific holdings, the Board believes that all of the requested relief is subsumed into the present holding.